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INTRODUCTION

CAMPAIGN FINANCE

*Senator Joseph Lieberman**

In her most recent book, *The Corruption of American Politics*, veteran Washington observer Elizabeth Drew writes that “indisputably, the greatest change in Washington over the past 25 years—in its culture, in the way it does business and the ever-burgeoning amount of business transactions that go on here—has been in the preoccupation with money. It has transformed politics and it has subverted values”¹

This evaluation, once nursed by a few public interest groups and reformers, now constitutes conventional wisdom. It explains the public’s alienation from the body politic and its disregard for elected officials. It undermines the good work performed by those in government and the public spirit with which it is routinely performed. And still, Congress is incapable of changing how United States federal campaigns are financed.

With the 2000 election cycle well underway, the worst habits of the past two decades seem to have become the springboard from which new standards are launched. Candidates are awash in more money than ever before and party fund-raising records are being shattered routinely. At least two presidential primary candidates—George W. Bush and Steve Forbes—have decided to forego public matching funds in order to avoid the related limits on their campaign spending.² Meanwhile, other candidates and third party groups are seeking ever more inventive ways to raise undisclosed and unlimited funds to communicate with voters and influence elections.³

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1. ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS* 61-62 (1999).

2. See Don Van Natta, Jr., *Bush Forgoes Federal Funds and Has No Spending Limit*, N.Y. TIMES, July 16, 1999, at A1.

3. See Susan B. Glasser & Juliet Eilperin, *A New Conduit for “Soft Money,”* WASH. POST, May 16, 1999, at A1; Jim Van deHei & Damon Chappie, *Veiled Groups Draw Scrutiny: GOP to Benefit from Unlimited Fundraising*, ROLL CALL, Sept. 20, 1999, at 1.

As a member of the Senate Governmental Affairs Committee, I had hoped the system had reached its nadir in the 1996 federal election campaign, which the committee investigated for most of 1997. I was too optimistic. Because of Congress' failure to enact campaign finance reform, the system continues to fester to a point where Arizona Senator John McCain calls it "nothing less than an elaborate influence peddling scheme in which both parties conspire to stay in office by selling the country to the highest bidder."⁴ Once again, we are witnessing the calculated efforts of both sides to evade, avoid, and subvert the laws regulating who can give how much to whom.

The complete story of the 2000 presidential race will eventually be told. Until then, the investigation conducted by the Governmental Affairs Committee is the best anatomy there is of how corrupt our elections have become. What that investigation revealed was the unsettling fact that in 1996, the major parties sabotaged some of the most fundamental values underpinning our American experiment in self-rule. And they gave people good reason to doubt whether they had a true and equal voice in their own government.

I have always believed the most serious transgressions of the 1996 presidential campaign were entirely legal. Hundreds of thousands of dollars in soft money contributions from wealthy donors blatantly skirted legal limits on individual contributions. Unions and corporations donated millions to both Republican and Democratic Parties, despite decades-old prohibitions on union and corporate involvement in federal campaigns. Tax-exempt groups paid for millions of dollars of television ads that clearly endorsed or attacked particular candidates although the law barred the groups from engaging in such extensive partisan electoral activity. Each of these acts compromised the integrity of our elections and our government. Each of these acts violated the spirit of our laws. And each is practiced with equal fervor to this day.

To achieve significant reform of the Federal Election Campaign Act⁵ (FECA), we simply must reduce the unrelenting pressure to raise vast sums of money. A ban on soft money contributions is the necessary beginning to that process and the McCain-Feingold proposal⁶ is the vehicle through which this goal, one day, will be accomplished. The record created by the Governmental Affairs Committee's hearings in 1997 helped

4. Senator John McCain, Campaign Finance Reform, Speech at Bedford, N.H. (June 30, 1999), *available at* <<http://www.mccain2000.com>> (hyperlink "Press Shop," "Speeches," "Campaign Finance Reform").

5. 2 U.S.C. §§ 431-456 (1994 & Supp. 1999).

6. Bipartisan Campaign Finance Reform Act of 1999, S. 1593, 106th Cong. (1999).

that bill obtain the votes of a majority of the Senate in the 105th and 106th Congress, but an anti-reform minority filibustered the bill and prevented it from passing both times. The House has twice approved the companion Shays-Meehan proposal. We know the lengths to which the parties felt they needed to go to raise money during the 1996 campaigns. Moreover, we know that in the first six months of the 2000 election cycle, both parties far outpaced their previous records. Compared to the first six months of the last presidential election cycle in 1995, Democrats and Republicans separately more than doubled their collection of unlimited soft money, with Democrats raising \$26.4 million in 1999 while Republicans raised \$30.9 million.⁷ This continued exponential growth rate—like an out-of-control virus—puts us all on notice for what is to come in the future if we do not put a lid on soft-money contributions.

In the best of all possible worlds, a soft money ban should be accompanied by stricter controls on election advocacy by third party groups. FECA limits both the amounts and the sources of funds that may be contributed to candidates and political parties in connection with federal elections, prohibiting, for example, contributions from corporations, labor unions, or foreign nationals who are not lawful permanent residents of the United States.⁸ FECA also imposes strict reporting and disclosure requirements on political committees involved in federal elections, requiring them to provide the public with a detailed accounting of the contributions they receive and the expenditures they make.⁹ The purpose of these laws is, among other things, to ensure honest elections by limiting the sources of campaign funds, and to ensure the public is informed of both the identity of those trying to influence its votes and the financial activities of the political parties.

The tax code, for its part, circumscribes the type of political activities in which organizations with tax-exempt status may engage. Groups with Internal Revenue Code § 501(c)(3) status—which confers not only tax-exempt status, but also the added ability to receive tax-deductible contributions—may not intervene in any political campaign on behalf of or in opposition to any candidate.¹⁰ The tax code permits organizations with § 501(c)(4) status—that qualify for tax-exempt status, but may not receive tax-deductible contributions—to engage in election advocacy as

7. See Federal Election Comm'n Press Release, FEC Releases Fundraising Figures of Major Political Parties—Large Gain in "Soft Money" Contributions (Sept. 22, 1999), available at <<http://www.fec.gov/press/ptymy99.htm>>.

8. See 2 U.S.C. §§ 441b, 441e (1994).

9. See *id.* at § 434.

10. See 26 U.S.C. § 501(c)(3) (1994).

long as such efforts do not make up the group's primary activity. Tax law restrictions limit these organizations' ability to engage in election advocacy.¹¹ In addition, the tax code does not permit contributions to political parties or candidates to be tax deductible.

These provisions reflect Congress' judgment that although taxpayers should subsidize the activities of groups working in the public interest by granting them favored tax status, that subsidy should not extend to organizations that focus primarily on political campaign work, unless those organizations are willing to comply with the regulation of the election laws.¹² Unfortunately, the scope of the activities some of these groups engaged in during the 1996 elections went far beyond what Congress intended, and both the tax-exempts themselves and the political parties used these organizations in ways that the election laws and the tax code were enacted to prevent.

The abuse continues as aggressive political advocates find new wrinkles in the law to exploit. An increasingly popular method of circumventing federal election laws centers on § 527 of the tax code,¹³ which exists precisely to provide tax exemption to organizations primarily involved in political activities—the party or candidate committees, for example. Section 527 has traditionally been understood to apply only to those organizations that registered as political committees under, and complied with, FECA, unless they focused exclusively on state and local political activities. Yet, after two IRS rulings recognized an organization's right to claim § 527 status in order to sponsor nationwide issue ad and voter guide campaigns explicitly aimed at influencing federal elections,¹⁴ the number of organizations switching to, or forming under, § 527 has blossomed. At the same time, these organizations claim their activities are free from FECA reporting requirements because they are not engaging in “express advocacy” of particular candidates. So, they are posing as “political organizations” under § 527, but not “political committees” under FECA, even though the definitions of the two—as they

11. *See id.* § 501(c)(4); Rev. Rul. 81-95, 1981-1 C.B. 332. Although the tax code permits organizations with § 501(c)(4) status to engage in candidate advocacy, provisions in FECA, such as the prohibition against corporations engaging in express candidate advocacy, generally restrict their ability to do so.

12. 26 U.S.C. § 527 grants exemption from certain taxes to political organizations engaged in attempting to influence federal, state, or local elections. Organizations involved in federal election activity that qualify for this status usually recognize that these activities also bring them under the purview of FECA's requirements.

13. 26 U.S.C. § 527 (1994).

14. *See* Priv. Ltr. Rul. 9725036 (Mar. 24, 1997); Priv. Ltr. Rul. 9652026 (Oct. 1, 1996); *see also* Priv. Ltr. Rul. 199925051 (Mar. 29, 1999); Priv. Ltr. Rul. 9808037 (Nov. 21, 1997).

pertain to federal activity—are essentially identical.¹⁵

Those of us who have been lobbying for campaign finance reform over the years realize it is a long-term commitment. We know success will not come without a sea change either in the attitude of elected officials or the public. And we harbor few hopes of reforming the campaign finance system in years, when campaigns are under way. Nevertheless, there are flaws in our campaign finance laws—oversights, really—that would require minimal effort to repair. Although the Justice Department has brought prosecutions dealing with many of the illegal activities of 1996, the criminal enforcement provisions of the election laws deny prosecutors the tools they need to be most effective. Under FECA, for example, there is no provision permitting felony prosecutions. Prosecutors have had to resort to other criminal laws with felony provisions—like conspiracy to defraud, or make false statements to the government—which are frequently inadequate. Likewise, the U.S. Sentencing Commission has no guidelines specifically tailored to violations of the campaign finance laws. Again, the absence of specific guidelines forces federal judges to turn to guidelines for other offenses, most frequently fraud. Perhaps if the criminal law had been more exacting, 1996 campaign finance scandal figures Charlie Trie and John Huang might have served jail time for their felony convictions rather than receiving sentences that enabled them to remain free. Straightforward remedies such as these would add muscle to the law and confer proper punishment on campaign finance violators.

The truth is that we cannot ever fully write into law what every citizen has a right to expect from his or her representatives—that those seeking to write the rules for the nation will respect them, rather than search high and low for ways to evade their requirements and eviscerate their intent, and that those who have sworn to abide by the Constitution will honor the trust and responsibilities the Constitution places in their hands, rather than cater to the special interests depositing soft money in their pockets.

We can reduce, however, the feverish and incessant chase for money—the chase that has pushed candidates and their parties to duck, dodge, and ultimately debase the laws we have now. The pressure to raise ever expanding sums of cash will continue to drive good people to do bad things, almost regardless of what the law calls for, if we do not comprehensively recast the system to defuse the fund-raising arms race permanently and stem the corrosive influence of big money. That is the challenge ahead of us.

15. Compare 26 U.S.C. § 527(e)(1) (defining “political organization” for purposes of the Internal Revenue Code), with 2 U.S.C. § 431(4)(A) (defining “political committee” for purposes of FECA). For a recent report on the “loophole” created by § 527 in today’s political financing system, see Van deHei & Chappie, *supra* note 3.

